

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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IN RE PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

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THIS DOCUMENT RELATES TO ALL  
CLASS ACTIONS

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) MDL No. 1456  
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) CIVIL ACTION: 01-CV-12257-PBS  
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) Judge Patti B. Saris  
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**DECLARATION OF STEVE W. BERMAN IN SUPPORT OF PLAINTIFFS'  
PROPOSED TRACK TWO DISCOVERY SCHEDULE**

I, Steve W. Berman, hereby declare that:

1. I am a member of Hagens Berman Sobol Shapiro LLP, resident in its Seattle, Washington, office and am Co-Lead Counsel for the Plaintiffs in the above-captioned action.

2. This declaration is submitted in support of Plaintiffs' Proposed Track Two Discovery Schedule.

3. Although some Track Two Defendants have produced a substantial amount of transaction data, the production of all relevant data needed to perform these calculations is not complete. B. Braun has refused to produce electronic data pending the outcome of its motion to dismiss. Additional examples are provided by Pfizer and Fujisawa. Below are Plaintiffs' experts' assessment of additional data needed from these two Defendants. Our intent in providing these examples is not to "pick on" Pfizer and Fujisawa but only to provide a salient example of missing data from some of the Defendants.

**Pfizer**  
**Preliminary Summary of Missing Data**  
**12/1/05**

**Direct Sales Data**

- Missing data prior to 1997 and after 2003 for all divisions.
- On the CD labeled PH066162, the following files are listed in the inventory (i.e., “Flat File Definition.xls”) but are not present on the disk. It looks like they were not successfully copied to the disk, so they need to be resent:
  - tran\_pfe\_98\_03.txt
  - tran\_pd\_ag\_00.txt
  - tran\_pd\_01\_03.txt
- Missing customer class of trade data for all divisions.
- Missing customer identification information (i.e., customer names and customer ID codes) for Parke-Davis/Agouron from 1997 to 2003.
- Missing customer identification information (i.e., customer names and customer ID codes) for Pfizer from 1998 to 2003.

**Chargeback or Indirect Sales Data**

- Missing data prior to 1997 and after 2003 for all divisions.
- Missing customer class of trade data for indirect customers for all divisions.

**Rebates and Administrative Fee Data**

- We do not have any electronic rebate or administrative fee data.

**Fujisawa**  
**Preliminary Summary of Missing Data**  
**11/30/05**

**Direct Sales Data**

- Missing data prior to January 2000 and after March 2004.
- Missing descriptions for customer class of trade fields.
- Missing descriptions for transaction type field.
- Missing the following drugs listed in the Complaint:
  - Lyphocin
  - Nebupent
  - Pentam 300

- acyclovir sodium
- dexamethasone sodium phosphate
- doxorubicin hydrochloride
- fluorouracil
- gentamicin sulfate
- vinblastine sulfate

**Chargeback or Indirect Sales Data**

- We currently have no chargeback data.

**Rebate and Administrative Fee Data**

- We currently have no rebate or administrative fee data.

4. The Track Two Defendants have engaged in many production delays that have prejudiced Plaintiffs' ability to complete discovery. Amgen, despite repeated demands, did not begin to produce documents until November 2005, and did so only after a motion to compel was filed. Additional documents were received this week, and Amgen still has not completed its production and has not committed to a completion date for its production, only vaguely forecasting that its production should be "substantially complete" by the end of the year. Despite significant efforts undertaken by Plaintiffs' counsel to review these documents – efforts that will continue for some time given the lateness and volume of the production – Plaintiffs could not have noticed all depositions of Amgen by December 3, 2005. Furthermore, additional meet and confers and potential additional requests are likely to be needed after completion of this initial review.

5. Other examples abound. For instance, Bayer made a supplemental production of approximately 181,000 pages of documents on November 2, 2005. Watson, despite representing that it would do so more than a year ago, did not supplement its original production of government production documents until November 18, 2005, and anticipates making another production this week. Watson also refused to review boxes of Schein documents that are warehoused but not indexed and is just beginning an electronic document search of e-mails and

memos. Pharmacia produced over 30,000 pages of documents on July 27, 2005, and another 18,000 pages in October. Abbott made substantial productions throughout November, 2005. It should be obvious that it was impossible to have noted witnesses for deposition in these circumstances prior to December 3<sup>rd</sup>.

Further the declarant sayeth not. I certify under penalty of perjury that the foregoing is true and correct. Executed this the 9th of December, 2005.

**/s/ Steve W. Berman**

STEVE W. BERMAN

**CERTIFICATE OF SERVICE**

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, **DECLARATION OF STEVE W. BERMAN IN SUPPORT OF PLAINTIFFS' PROPOSED TRACK TWO DISCOVERY SCHEDULE** to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on December 9, 2005, a copy to LexisNexis File & Serve for Posting and notification to all parties.

By           /s/ Steve W. Berman            
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